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In the Supreme Court of the United States,

OCTOBER TERM, 1889.

NO. 1399.

WILLIAM H. BLOUNT, *Plaintiff in Error*,

v.

JULIUS H. WALKER, EXECUTOR AND TRUSTEE, AND CAROLINE S. WALKER, *Defendants in Error.*

In Error to the Supreme Court of South Carolina.

MOTION BY DEFENDANTS TO DISMISS.

Argument for the Motion.

JOS. DAN'L POPE,
ROBT. W. SHAND,
Attorneys for Defendant in Error.

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INDEX.

Notice of Motion and acceptance of Service 35
Argument, with brief statement of facts..... 1

Appendix:—
- Will of Mrs. Harris 12
- Will of Mrs. Blount 14
- N. C. Probate Proceedings 15
- Complaint..... 19
- Answer of J. H. Walker..... 22
- Answer of Mrs. Walker 24
- Circuit Decree..... 26
- Opinion of Supreme Court of S. C..... 27
- Petition for Writ of Error 31
- Writ of Error..... 33

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Argument for the Motion.

This is a motion to dismiss a cause (No. 1399) now on the docket of this court, brought up here from the Supreme Court of South Carolina under writ of error granted by the Chief Justice of the State Court. The motion is made upon the ground that this court is without jurisdiction, as no federal question is involved. 1

The federal question alleged to be involved, as we understand it, is that the Supreme Court of South Carolina did not give "full faith and credit" to the "judicial proceedings" of a Probate Court in North Carolina, whereby the will of a testatrix duly domiciled in North Carolina, was admitted to probate there, and declared to be the duly executed will of such testatrix. But a statement of the facts of the case, and the decision of the Supreme Court of South Carolina, will show, that no question was 2

ever made—no ruling rendered—to the contrary. The point raised in the pleadings and decided by the South Carolina Court was: that under a power given in a South Carolina will by a South Carolina testatrix to her North Carolina daughter to appoint the estate by a "last will and testament duly executed," meant precisely the same as if the words had been "by a last will and testament duly executed according to the laws of South Carolina;" and fully admitting under the authority of the North Carolina probate all that the appellant contended for—that this daughter's will (wherein she attempted to execute this power) was duly executed according to the laws of North Carolina, the court ruled that it was not a due execution of the power conferred, because the daughter's will was not executed according to the laws of South Carolina (as was conceded); and that only a South Carolina execution would fulfil the conditions imposed by the donor of the power in this South Carolina will.

The appellant sought to win his case (as he did win it on Circuit) altogether on a question of the construction of a South Carolina will, and on the construction of this South Carolina instrument the case was decided on the appeal.

The complaint, answers, Circuit decree, exceptions, opinion of the Supreme Court, petition for writ, and writ of error are printed *in extenso* as an appendix hereto. They may be summarized as follows:

For many years previous to her death Mrs. Sarah J. Harris, a widow, resided in the city of Columbia, in the State of South Carolina, where she died in December, 1885, leaving of force her last will and testament, bearing date September 11, 1885. Mrs. Harris left surviving as her sole issue her daughter, Mrs. Mary Delia Blount, domiciled in Wilson, in the State of North Carolina, at the date of her mother's will, and ever afterwards, until her own death, in April, 1886. Mrs. Harris' next nearest of kin was her sister, Caroline S. Walker, who is the mother of Julius H. Walker.

Mrs. Harris, by her will, gave her entire estate (consisting of a lot of land in said city of Columbia and certain stocks, bonds, and other personalty, all in S. C.) to her nephew, Julius H. Walker, in trust for Mary D. Blount for life, and upon the death of Mrs. Blount the estate was "devised and bequeathed to the

issue of the said Mrs. Blount, to them and their heirs forever, *per stirpes* and not *per capita;* if the said Mrs. Blount die without issue surviving her at the time of her death, then the same is devised and bequeathed *to such person or persons, and in such proportions, as the said Mrs. Mary Delia Blount may appoint by her last will and testament duly executed, to the said appointees and their heirs forever.*" [There are no italics in the original.] And Julius H. Walker was appointed and qualified as executor and took possession as trustee. 7

On the 9th day of the following April Mrs. Blount died at her home in Wilson, N. C., never having had issue. She left a will bearing date March 16, 1886, whereby she undertook, *by words sufficiently descriptive of her mother's estate as well as her own,* to appoint and give it all to her surviving husband, W. H. Blount, who is the appellant in error here. 8

This will was duly admitted to probate in the Probate Court of Wilson County, North Carolina, that court declaring that the paper offered for probate was "the last will and testament of M. Delia Blount, and that the same was duly executed by said M. Delia Blount." 9

This North Carolina Court (as was proved at the trial) is a court of record and of general jurisdiction, and its ruling as to the validity of a will is conclusive, unless reversed on appeal. *Code of N. C.*, §§ 103, subd. 2; 108, 2148, 2150; *Edwards* v. *Cobb*, 95 N. C., 4. An exemplification of the proceedings in this North Carolina Court of Probate was duly filed and admitted to probate in the proper Probate Court in South Carolina.

Within a year after the death of Mrs. Blount, W. H. Blount instituted his action in the Court of Common Pleas (within its equity jurisdiction) for Richland County, in South Carolina, against J. H. Walker as executor and trustee, and Mrs. Caroline S. Walker, setting forth the death of Mrs. Harris and her will, the death of Mrs. Blount and her will, and therein claiming the entire estate of Mrs. Harris, as the appointee under Mrs. Blount's will, and alleging his demand upon the trustee and executor for an account and the refusal to account. He prayed for an accounting, and that he be adjudged to be the owner of the estate of Mrs. Harris. 10

J. H. Walker answered, admitting that he held the estate of

Mrs. Harris as trustee, and not in his own right; that he had been advised by counsel not to turn over this estate to plaintiff until it should be determined that the will of Mrs. Blount had been duly executed according to the laws of South Carolina, or until ordered to do so by the court; and that Mrs. Caroline S. Walker had insisted that he should so act. Mrs. Walker answered, alleging that Mrs. Blount's will was not executed as required by the laws of South Carolina, and was not, therefore, a valid execution of the power. She therefore claimed to be entitled to the whole estate of Mrs. Harris, as Mrs. Harris' sole heir after Mrs. Blount's death.

At the trial the following written admission, signed by plaintiff's attorney, was filed on the record: "It is admitted by plaintiff that the will of Mrs. M. D. Blount was not executed according to the requirements of the laws of South Carolina, in that one of the witnesses did not subscribe his name thereto in the presence of the other two witnesses."

It is well, just at this point, to inform the court that the law of South Carolina as to the execution of wills reads as follows:

"All wills and testaments of real and personal property shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, and of each other, by three or more credible witnesses, or else they shall be utterly void and of none effect." *Gen. Stat.* of S. C. of 1882, page 544, section 1854. It will thus be seen that a South Carolina will must be executed by testator in the presence of three witnesses, who must subscribe their names, not only in the presence of testator, but also *in the presence of each other.* And this, it is admitted, was not done in the case of Mrs. Blount's will.

Such was the case presented to the Circuit Judge, Hon. W. H. Wallace, in July, 1887. His honor said:

"Mrs. Blount's will is not executed according to the laws of South Carolina. The question to be determined is whether Mrs. Blount's will is a valid execution of the power contained in Mrs. Harris' will. It is conceded in the argument, and is undoubtedly sound, that the appointee under a power like the one under consideration, takes under the instrument creating the power, and

not under the instrument of appointment. And in this case Mrs. Harris' will expressly conveys the property to the appointee under the power. The only requisite required by Mrs. Harris' will for the execution of this power, is that the same shall be by 'will duly executed;' and in this case that formality has been complied with, and is shown by the judgment of the court of her domicile. It is therefore ordered, adjudged, and decreed, that the power is well executed, and the plaintiff is entitled to the property set out in the complaint and in the hands of the defendant, Julius H. Walker." 15

Having reached this conclusion, the Circuit Judge did not pass upon the question, who would be entitled to take if the power was not well executed. 16

Defendants appealed from this decree to the Supreme Court of South Carolina, November Term, 1887. See *Blount* v. *Walker*, 28 S. C., 545.

The opinion of the majority of that court was delivered by Mr. Justice McIver. The decision is put squarely upon the ground that the power must be exercised in the mode prescribed by the donor of the power, and that mode is to be ascertained from the terms of the will creating the power. The court say: 17

"Now, in this case the mode prescribed by the donor of the power is expressed in these words, 'by her last will and testament duly executed,' and the controlling question is, what was the intent of Mrs. Harris in using these words? Did she mean a will duly executed according to the laws of South Carolina, or did she mean a will duly executed according to the laws of any State or country in which the donee of the power might happen to be domiciled at the time of her death?" Then after stating the principle which should govern the court in reaching Mrs. Harris' intentions, the opinion proceeds: 18

"Here was a South Carolina lady making her will in this State, whereby she was undertaking to dispose of property located here, and in doing so she confers a power which the donee can only exercise 'by her last will and testament *duly* executed.' It seems to us that in the absence of anything in the will indicating a different purpose, these words must be interpreted to mean what they ordinarily and usually signify here; that is, a will duly executed according to the laws of South Carolina.

19 * * * * * *

"It is said, however, that if Mrs. Harris had intended that Mrs. Blount should exercise the power of appointment only by a will executed in the manner prescribed by our statute, it would have been very easy for her to say so by the addition of a very few words to those prescribing the mode of appointment—that she might have said, 'by her last will and testament duly executed,' *according to the laws of South Carolina*. But according to our view, that is precisely what the words used mean, and the additional words suggested would have been mere surplusage."

20 The decision was thus squarely based upon the question of the construction of a South Carolina paper. It is so stated at the outset by Judge McIver. But that there might be no possible misunderstanding of the grounds of this decision, Judge McIver, speaking for the court, concedes to the North Carolina probate all that was claimed for it—that it conclusively established the fact that Mrs. Blount had left a "will duly executed." Hear what he says upon this point:

"The fact that the paper alleged to be the will of Mrs. Blount
21 has been admitted to probate in North Carolina, and an exemplification thereof [admitted to probate] in this State, does not affect the question. This paper was, doubtless, a valid will in North Carolina, sufficient to pass any property which Mrs. Blount was entitled to in her own right in that State, and any personal property which she owned anywhere, and was, therefore, no doubt properly admitted to probate there, as well as here, upon the exemplification under the statute. But the question here is, not whether Mrs. Blount has made a will disposing of her own property, but whether the paper propounded as such is a
22 valid execution of the power conferred by the will of Mrs. Harris; and, for the reasons above stated, we do not think it is."

The question who were entitled to take, as Mrs. Blount had failed to make a valid appointment, the court declined to consider, as it had not been considered on Circuit, and the cause was remanded. At the second trial the Circuit Court ruled that the estate of Mrs. Harris passed (subject to the life estate) to Mrs. Blount, and then the personalty, under Mrs. Blount's will, to her husband, and the realty (in South Carolina) as intestate property, half to her husband and half to her aunt, Mrs. Walker.

Defendants again appealed, and the Supreme Court of the State 23
reversed this Circuit decree, holding that the entire estate, real and personal, resulted, after the death of Mrs. Blount, to such person as then was nearest surviving heir of Mrs. Harris—and that was her sister, Mrs. Walker. This was a final decision as to plaintiff, for it excluded him from any participation in the estate. See *Blount* v. *Walker*, 31 S. C., 13 (not yet published), and 9 S. E. Rep., 804. But no error involving a federal question is alleged, as we understand it, in the decision of the State Court on this second appeal. (See petition for writ of error in 24
the appendix.)

Such is a full and, we believe, candid statement of the appellant's case. But we desire this court to be fully informed of the case, for we are sure that no federal question can be discovered in any ruling contained in the judgment of the South Carolina Court. The alleged federal question, according to the truth, is this and only this: that a South Carolina will having permitted an appointment to be made *only* "by last will and testament *duly executed according to the laws of South Carolina*," the Supreme Court of South Carolina refused to declare 25
this power validly executed by a will which was held by the proper court of general jurisdiction in North Carolina to be a duly executed will, and which was duly exemplified to the proper probate court of South Carolina and there filed, and also admitted to probate there, not only being no proof, but it being admitted on the record, that such will, containing the proper words of appointment, was not executed according to the laws of South Carolina; and so held in the Circuit decree, to which appellant took no exception.

Or to state it more briefly: Is an exemplification of a North 26
Carolina probate of a North Carolina will, conclusive upon the Supreme Court of South Carolina that such will was duly executed according to the laws of South Carolina?

It is manifest that the decision of the South Carolina Court rested wholly on a question of construction. With the proper parties before it, and a subject-matter clearly within its jurisdiction, the Supreme Court of South Carolina construed and interpreted Mrs. Harris' will to give her estate to such person, and to such person only, as might receive an appointment by

27 Mrs. Blount's "last will and testament duly executed according to the laws of South Carolina." The case turned entirely upon the meaning to be given to the words "last will and testament duly executed," to be found in Mrs. Harris' will. Judge McIver states it with great clearness: "The controlling question is, what was the intent of Mrs. Harris in using these words? Did she mean a will duly executed according to the laws of South Carolina, or did she mean a will duly executed according to the laws of any State or country in which the donee of the power might happen to be domiciled at the time of her death?" and
28 the opinion answers this question, and declares the intent and meaning of Mrs. Harris' will. Whether the construction of the South Carolina Court was right or wrong, is not now a question; it was the ruling of a competent court upon a matter of which, and between parties of whom, it had undoubted jurisdiction, and involves no federal question. Having reached this conclusion, the North Carolina probate was no longer a relevant matter; for, (1) the North Carolina Probate Court had no jurisdiction, on an *ex parte* proceeding, to declare a will duly executed "according
29 to the laws of South Carolina," (2) the North Carolina Court made no such deliverance, and (3) it was admitted on the record that Mrs. Blount's will had not been so executed.

Under the general principles invariably applied by this court, in cases where its jurisdiction is denied, it is so clear to our mind that this appeal involves no federal question, that we are inclined to cite no authorities. We will refer to very few. The whole subject is well treated by Mr. Spear "On the Law of the Federal Judiciary," at pages 582–596, edition of 1883, and the leading cases of this court are there stated.

30 Speaking of the effect given by the act of Congress to the judgment of a sister State, Judge Story says:

"It gives them the same faith and credit as they have in the State Court from which they are taken. If in such court they have the faith and credit of the highest nature, that is to say, of *record* evidence, they must have the same faith and credit in every other court. So that Congress have declared the *effect* of the records by declaring what degree of faith and credit shall be given to them. If a judgment is conclusive in the State where it is pronounced, it is equally conclusive everywhere. If re-

examinable there, it is open to the same inquiries in every other State. It is therefore put upon the same footing as a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it; or the right of the State itself to exercise authority over the persons or the subject matter." 2 *Story Const.*, § 1313. 31

The State Court of South Carolina distinctly admits that Mrs. Blount left a will good in North Carolina, and as to personalty good everywhere, but that "a will" was not sufficient to execute the power. The State Court, therefore, has made no decision against the title, right, privilege, or immunity claimed, and therefore the writ of error must be dismissed. *Chappell* v. *Bradshaw*, 128 U. S., 133; *Clark* v. *Pennsylvania*, *Ibid.*, 397. As in *DeSaussure* v. *Gaillard* (127 U. S., 216), the question was decided upon the meaning of a South Carolina statute before the federal question was reached, so here the case was decided upon the intent and meaning of a South Carolina will before the federal question was reached. And stronger still: here the State Court conceded to the judgment of its sister State all that was claimed for it. 32 33

Crapo v. *Kelley* (16 Wall., 610) is very different from this case. There the appellant claimed that the effect of a Massachusetts assignment under the order of a Massachusetts court was to vest property in him. The New York Court denied this effect. This court held that the appellant had a right to have this question considered by this court, and it was here considered and appellant sustained. But in our case appellant never claimed any more for his N. C. judgment than that it established the existence a will duly executed, and this the South Carolina Court conceded, but said something more was required than "a will duly executed"—it must be "a will duly executed according to the laws of South Carolina," and appellant never claimed that the N. C. probate did or could establish the existence of such a paper as that. 34

In fact, a probate in N. C. does not give validity to a will here

35 until probated here. *Armstrong* v. *Lear*, 12 Wheat., 169; *Dial* v. *Gary*, 14 S. C., 573. In order to get its probate here, the N. C. probate is made sufficient evidence. *Gen. Stat.* of S. C., § 1875. So that the only place where this federal question was involved, was in the Probate Court of S. C., and there full faith and credit was given to the exemplification; for on it, and it alone, the will of Mrs. Blount was admitted to probate in S. C. The only question after that was whether this *will* was such a paper as fulfilled the terms of the power, and the South Carolina Supreme Court say it was not. Probate of a will in one State
36 is not proof of its sufficiency as a will to pass realty in another State. *Robertson* v. *Pickrell*, 109 U. S., 608. *A fortiori*, it is not proof of its sufficiency as an execution of a power.

"If probate is granted of a will, then that conclusively establishes, in all courts, that the will was executed according to the law of the country where the testator was domiciled." *Freem. Judg.*, § 608. But it does not establish that it was executed according to the law of some other country. "Of course, such
37 probate does not touch the question of the application of the will to real estate unless the will be executed and recorded according to the *lex rei sitae*." *Ibid.* Nor, of course, does it touch the question whether it is executed with such formalities as are required to fulfil the terms of a power conferred in a will of some other State.

Whether a will is executed according to the requirements of a power is never determined by the Probate Court, which has jurisdiction only to pronounce upon its character as a testamentary paper—whether a will or not a will. If the will is admitted
38 to probate, that establishes its status as a will; but the Court of Equity passes upon its validity as an instrument executing a power. 1 *Wms. Ex'rs*, *46, *47; 1 *Jarm. Wills* (R. & T. edit.), 55. Indeed, it is well settled law that the probate of a will does not, even in the same State, conclusively determine the validity of a devise. *Darby* v. *Mayer*, 10 Wheat., 468; *Whart. Confl. L.*, § 645; 1 *Redf. Wills*, 397; *Tygart* v. *Peeples*, 9 Rich. Eq., 46; *Sally* v. *Gunter*, 13 Rich., 76.

If, therefore, the plaintiff here had made (which he did not) so preposterous a claim, as that the North Carolina probate es-

tablished that Mrs. Blount's will had been duly executed according to the laws of South Carolina, still this court should not hesitate, even on mere motion, to dismiss this writ of error for want of jurisdiction. For, as Chief Justice Waite said, in *Millingar* v. *Hartupee* (6 Wall., 262): "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power." And, applying this principle to the case then before the court, the Chief Justice says: "In the case before us, Millingar claimed authority under an order of the District Court. On looking at the order we find that it does not purport to confer any authority whatever upon him." 39 40

But really the case presented to the South Carolina Court was as follows:

Mr. Blount presents a paper to the court, and claims that under the adjudication of a North Carolina Probate Court, having jurisdiction, and the exemplification thereof admitted to probate in a proper Probate Court of South Carolina, the paper so presented was the duly executed will of Mrs. Blount. 41

The court replies that the evidence fully sustains this claim.

Mr. Blount then demands the estate of Mrs. Harris as the appointee of Mrs. Blount.

The court replies that he is not so entitled, unless Mrs. Blount's will was duly executed according to the laws of South Carolina, and asks for proof upon that point.

Mr. Blount says he can furnish no such proof, but, on the contrary, is forced to admit that his wife's will was not so executed.

Then, says the court, we cannot hold that you are the appointee of Mrs. Harris' estate, and we must decide the case as if there had been no appointment, and accordingly so decides. 42

We therefore ask that the writ of error be dismissed for want of jurisdiction in this court.

JOS. DAN'L POPE,
ROBT. W. SHAND,
Attys. for Defendants in Error.

43

APPENDIX.

WILL OF MRS. S. J. HARRIS.

THE STATE OF SOUTH CAROLINA.

In the name of God. Amen. I, Sarah J. Harris, widow, of the city of Columbia, in the State aforesaid, being of sound mind, memory, and understanding, do make, publish, and declare this
44 my last will and testament.

Item I. I give, bequeath, and devise to my nephew, Julius H. Walker and his heirs, to the use of the said J. H. Walker and his heirs, all the estate, real and personal, of which I may die seized, possessed, and entitled to: in trust, nevertheless, to permit my daughter, Mrs. Mary Delia Blount, for and during the term of her natural life (unless the trust be sooner executed, as is hereinafter provided in Item II.), to receive unto her own sole, separate, and exclusive use, benefit, and behoof, all the rents, issues, and pro-
45 fits of the said estate, upon her own receipts and acquittances. And to the said J. H. Walker, in his character as trustee as aforesaid, full power and authority is given to sell, exchange, or transfer, if in his judgment expedient, any part of the estate hereby given to him in trust, and to execute all necessary papers to that end, whenever he is thereunto requested by a paper in writing, executed by said Mrs. Blount in the presence of some clerk of a court of record, who shall certify, under his hand and official seal, that the said request was so signed separately and privately in his presence; and the said trustee, upon such sale,
46 exchange, or transfer, shall either reinvest the proceeds or else turn the same over to the said Mrs. Blount for her sole, separate, and absolute use, freed and discharged of all trusts, as the said Mrs. Blount may direct by her writing, executed in manner and form as required aforesaid, for the request to sell, exchange, or transfer: *Provided*, That the said J. H. Walker, as trustee as aforesaid, is satisfied that the disposition so requested by said Mrs. Blount is her free and untrammelled wish, and is for her

own exclusive benefit and behoof; but if not so satisfied, he shall 47
reinvest the proceeds according to his best judgment, and under the rules of law. The power hereinabove given to the said J. H. Walker, as trustee as aforesaid, is a continuing power, and shall not be exhausted by one or more exercises thereof, but shall continue in full force so long as the trust remains unexecuted and any portion of the trust estate remains.

Item II. But if, at any time, the said property, or any part thereof, shall be legally advertised for sale for payment of the debt or debts of said Mrs. Blount, under or by virtue of any 48
attachment, execution, or decree or order of court, or under any power of sale given by the said Mrs. Blount, to or for the use of any creditor or other person (such attachment, execution, decree, order, or power of sale being valid in law or equity); or if at any time said Mrs. Blount shall execute a valid power, authorizing a sale of the said property, or any part thereof, without advertisement; or if at any time process or order of any court of competent jurisdiction shall take the interest of said Mrs. Blount in said property, or any part thereof, away from her: then, in any of the cases specified in this item of this will, the uses above de- 49
clared shall instantly shift to the issue then living of said Mrs. Blount, to them and their heirs for ever, *per stirpes* and not *per capita*, to the extent of the property affected by any of the advertisements, orders, or papers aforesaid, and to the same extent the trusts by this will declared shall instantly become executed; but in default of issue of Mrs. Blount then living, then the said J. H. Walker shall continue to hold such property in trust to preserve the rents, issues, and profits thereof, and to accumulate the same until the death of said Mrs. Blount, when the property so affected and its accumulations shall pass under the provisions of Item III. 50
of this will.

Item III. Upon the death of the said Mrs. Blount, the said property, or so much thereof as remains unconsumed and undisposed of in the hands of said J. H. Walker, trustee as aforesaid, is hereby bequeathed and devised to the issue of the said Mrs. Blount, to them and their heirs for ever, *per stirpes* and not *per capita;* and if the said Mrs. Blount die without issue surviving her at the time of her death, then the same is devised and bequeathed to such person or persons and in such proportions as

the said Mrs. Mary Delia Blount may appoint by her last will and testament duly executed, to the said appointees and their heirs forever; and upon the death of the said Mrs. Blount, the trusts of this will shall become instantly executed (so far as the same have not been before that time executed under the provisions of Item II. of this will) in favor of the person or persons in this item designated as remaindermen, without any relinquishment or transfer of trust by the said trustee.

Item IV. I hereby nominate and appoint Julius H. Walker executor of this will.

In witness whereof I have signed my name at the foot of this will, and also on the first half sheet thereof, at Columbia, in the presence of my three chosen witnesses, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-five.

SARAH J. HARRIS, [L.S.]

Signed, published, and declared by Mrs. Sarah J. Harris as her last will and testament, in our presence, who, in her presence and at her request, and in the presence of each other, have hereunto below, and also on the first half sheet thereof, signed our names as witnesses to its execution (the words executed on line 16, page 1, and of "Mrs. Blount," on line 12 of page 3, being first interlined).

ROBT. W. SHAND,
CAROLINE J. WALKER,
MAMIE S. WALKER.

WILL OF MRS. M. D. BLOUNT.

THE STATE OF NORTH CAROLINA,
Wilson County.

I, M. Delia Blount, of the County and State aforesaid, knowing the uncertainty of life, and being of sound mind and memory, do, by this writing, make, ordain, publish, and declare my last will and testament, in manner and form following:

All my estate, both real and personal, whether legal or equitable, I devise, bequeath, and absolutely give unto my beloved husband, to his only use and behoof, and hereby direct the trus-

tee appointed by the last will and testament of my deceased mother, Mrs. S. J. Harris, of Columbia, in the State of South Carolina, to execute all such needful conveyances and releases as may effectually divest his title as such trustee, and convey the property and effects, to him devised by said last will of Mrs. S. J. Harris, to my said husband, W. H. Blount, to him and his heirs absolutely. 55

In testimony whereof I have hereunto subscribed my name and affixed my seal, the 16th March, Anno Domini one thousand eight hundred and eighty-six.

M. D. BLOUNT, [SEAL.] 56

NORTH CAROLINA PROBATE PROCEEDINGS.

STATE OF NORTH CAROLINA, Wilson County.

In the matter of the last will of M. Delia Blount. Before A. B. Deans, Clerk Superior Court. 57

W. H. Blount, being duly sworn, doth say: That M. Delia Blount, late of said County, is dead, having first made and published her last will and testament; and that W. H. Blount is the sole beneficiary named therein. Further, that the property of the said M. Delia Blount, consisting of real estate in Columbia, South Carolina, and bonds, notes, bank stock, and other personal property, is worth about ten thousand dollars, so far as can be ascertained at the date of this application; and that W. H. Blount, sole beneficiary under the provisions of said will, is entitled under said will to the said property. 58

W. H. BLOUNT.

Sworn and subscribed before me, the 26th day of April, 1887.

A. B. DEANS,
Clerk Superior Court.

STATE OF NORTH CAROLINA, Wilson County. *ss.* *In the Probate Court.*

A paper, purporting to be the last will and testament of M. Delia Blount, deceased, is exhibited before me, the undersigned,

judge of probate for said county, by W. H. Blount, the sole beneficiary therein mentioned, and the due execution thereof by the said M. Delia Blount by the oath and examination of I. K. Ruffin and Mrs. Jas. B. Davis, two of the subscribing witnesses thereto; who, being duly sworn, doth depose and say, and each for himself deposeth and saith, that he is a subscribing witness to the paper writing now shown him, purporting to be the last will and testament of M. Delia Blount; that the said M. Delia Blount, in the presence of this deponent, subscribed her name at the end of said paper writing, which now shown as aforesaid, and which bears date of the 16th day of March, 1886. And the deponent further saith, that the said M. Delia Blount, the testator aforesaid, did, at the time of subscribing her name as aforesaid, declare the said paper writing, so subscribed by her and exhibited, to be her last will and testament, and this deponent did thereupon subscribe his name at the end of said will as an attesting witness thereto, and at the request and in the presence of the said testator. And this deponent further saith, that at the said time, when the said testator subscribed her name to the said last will as aforesaid, and at the time of deponent's subscribing his name as an attesting witness thereto as aforesaid, the said M. Delia Blount was of sound mind and memory, of full age to execute a will, and was not under any restraint to the knowledge, information, or belief of this deponent. And further these deponents say not.

(Signed) I. K. RUFFIN, [SEAL.]
(Signed) MRS. J. B. DAVIS, [SEAL.]

Severally sworn and subscribed, this 26th day of April, 1886, before me.

A. B. DEANS,
Clerk Superior Court.

STATE OF NORTH CAROLNA, Wilson County. } *In Superior Court.*

In the matter of the last will of M. Delia Blount.

It appearing to the court, by the oath and examination of Dr. J. K. Ruffin and Mrs. J. B. Davis, the subscribing witnesses thereto, that the paper writing propounded by W. H. Blount, beneficiary therein named, is the last will and testament of M. Delia Blount, and that the same was duly executed by said M.

Delia Blount in the presence of said witnesses, and that at the 63
time of signing the same, the said M. Delia Blount was of sound mind. It is therefore adjudged, that the said paper writing be admitted to probate as the last will and testament of the said M. Delia Blount, and the executor therein named qualify as such.

This the 26th day of April, 1886.

A. B. DEANS,
Clerk Superior Court.

STATE OF NORTH CAROLINA, Wilson County. } *In the Superior Court.* 64

To all whom these presents shall come—greetings:

It being satisfactorily proven to the undersigned, Clerk of the Superior Sourt for the County of Wilson, that M. Delia Blount, late of said county, is dead, having made and published last will and testament, and it appearing that W. H. Blount is entitled to the administration of the estate of the deceased, and having qualified as administrator according to law:

Now, these are, therefore, to empower the said administrator to enter in and upon all and singular the goods and chattels, 65
rights and credits, of the said deceased, and the same to take into possession, wheresoever to be found, and all of the just debts of the said deceased to pay and satisfy, and the residue of said estate to distribute according to law.

Witness my hand and the seal of said court, this the 3rd day of June.

A. B. DEANS,
Clerk Superior Court.

A true copy of the letters of administration.

A. B. DEANS, 66
C. S. C.

STATE OF NORTH CAROLINA, Wilson County. } *In the Superior Court, 3rd Judicial District.*

I, A. B. Deans, Clerk of the Superior Court in and for the County of Wilson, in the State aforesaid, and *ex officio* probate judge, do hereby certify that I am, and was on the 26th day of April, 1886, the Clerk of the Superior Court of Wilson County, empowered by law to take the probate of wills and grant letters of administration, and to exemplify, under seal of the court, all

transcripts of deed, papers, or proceedings in said court, which shall be received in evidence, and do hereby certify that the foregoing judgment of probate was duly taken, and is of record in the book of records of the judgments of probate in and for said county, and that in all respects said judgment and proceedings in the matter of the probate of the last will and testament of M. Delia Blount is in accord with the laws of this State, and that the copy hereto attached is a true and perfect copy, as appears of record.

In witness whereof, I have hereto attached my seal of office, at office in the town of Wilson, in the State aforesaid, this the 18th day of April, A. D. 1887.

A. B. DEANS, *C. S. C.*

STATE OF NORTH CAROLINA, Wilson County. } *Superior Court, 3rd Judicial District.*

I, H. G. Conner. Judge of the 3rd Judicial District of North Carolina, do hereby certify that A. B. Deans is the Clerk of the Superior Court of Wilson County, the same being a court of record of general and superior jurisdiction; that he was duly elected and qualified according to law, and was such on the 26th day of April, 1886; and that his genuine signature is attached to the foregoing certificate, and that the same is in due form, and, as such, entitled to due credit.

Witness my hand and private seal, this the 19th day of April, 1887.

(Signed) H. G. CONNER, [SEAL.]

Judge Superior Court, 3rd Judicial District of North Carolina.

NORTH CAROLINA, Wilson County. }

I, A. B. Deans, Clerk of the Superior Court, in and for the County of Wilson, in the State of North Carolina, do certify that H. G. Conner is now, and was on the 19th day of April, 1887, a Judge of the Superior Court of North Carolina, resident in the 3rd Judicial District; that he is well known to me; and that his signature, affixed to the certificate, is the genuine handwriting of the said H. G. Connor, judge as aforesaid.

Witness my hand and seal of office, the first of June, 1887.

A. B. DEANS, *C. S. C.*

I, Alfred M. Scales, Governor of the State of North Carolina, 71
do hereby certify that Henry G. Conner is one of the Judges of the Superior Courts of North Carolina, the same being courts of records of general jurisdiction, and specially of the third judicial district of said State, and that Wilson County is one of the counties comprising said district.

Done in the city of Raleigh, in said State, on this the 26th day of April, 1887.

A. M. SCALES,
Governor of No. Ca.

72

By the Governor:
C. H. ARMFIELD, *Private Secretary.*

COMPLAINT.

(Title of cause.)

The plaintiff, complaining of the defendant, alleges:

I. That on the 5th day of December, 1885, Sarah J. Harris, 73
late of the County of Richland, and State of South Carolina, departed this life, leaving of force her last will and testament, which was duly proved in the office of the Judge of Probate for said County on the 21st December, 1885, and the defendant, Julius H. Walker, the executor named therein, qualified as executor thereunder.

II. That at the time of her death, the said Mrs. Sarah J. Harris was seized and possessed of the following described real estate, to wit: all that lot or parcel of land, situate in the city of Columbia, State of South Carolina, at the southeast corner of 74
the intersection of Bull and Gervais streets; bounded on the north by Gervais street, on the east by lands of Mrs. Caroline M. Walker, on the south by lands now of —— Irving and estate of Mayrant, and on the west by Bull street, containing one and one-third (1⅓) acres, more or less; and the following personal property, to wit: 25 shares of the capital stock of the Carolina National Bank, standing in name of Julius H. Walker, of the value of three thousand dollars; 1 bond, 1st mortgage, C., C. & A. R. R., of the value of eleven hundred and thirty dollars, of the total value of four thousand one hundred and thirty dollars,

as appears by the appraisement now on file in the office of the Probate Court for said County, and plaintiff is informed and believes there were no debts, or, if any, to only an inconsiderable amount.

III. That by the terms of her said will, the said Sarah J. Harris devised and bequeathed all her estate, both real and personal, to her nephew, the defendant, Julius H. Walker, and his heirs, to the use of the said Julius H. Walker and his heirs, in trust, nevertheless, to permit my daughter, Mrs. Mary Delia Blount, for and during the term of her natural life, to receive unto her sole, separate, exclusive use, benefit, and behoof, all the rents, issues, and profits of the said estate, and after making provision for shifting uses upon the contingencies therein mentioned, and for sale, or sale and reinvestment upon the terms therein mentioned, proceeds as follows, to wit: "3. Upon the death of the said Mrs. M. Delia Blount, the said property, or so much thereof as remains unconsumed and undisposed of in the hands of the said Julius H. Walker, trustee as aforesaid, is hereby bequeathed and devised to the issue of the said Mrs. M. Delia Blount, to them and their heirs for ever, *per stirpes* and not *per capita;* and if the said Mrs. M. Delia Blount die without issue surviving her at the time of her death, then the same is devised and bequeathed to such person or persons, and in such proportion, as the said Mrs. M. Delia Blount may appoint by her last will and testament, duly executed, to the said appointees and their heirs for ever; and upon the death of the said Mrs. M. Delia Blount, the trusts of this will shall become instantly executed (so far as the same have not been before that time executed under the provisions of Item II. of this will) in favor of the person or persons in this item designated as remaindermen, without any relinquishment or transfer of trust by said trustee;" all of which will more fully and at large appear by reference to the copy of said will, which is hereto annexed and made a part of this complaint, marked exhibit "A."

IV. That at the time of the execution of the said will, and ever since, up to the time of her death, the said Mrs. M. Delia Blount was a married woman, domiciled in the State of North Carolina, to wit: at Wilson, in said State.

V. That none of the *corpus* of the said estate has been con-

sumed or disposed of under the terms of the said will; and at 79
the time of the death of the said Mrs. M. Delia Blount, the whole estate was in the hands of the said trustee.

VI. That on the 9th day of April, 1886, at her home in Wilson, North Carolina, the said Mrs. M. Delia Blount departed this life without leaving any issue her surviving, but having duly executed and leaving of force her last will and testament, which was duly admitted to probate in the Court of Probate in said County of Wilson and State of North Carolina, the same being a court of record and a superior court of general probate jurisdiction in said State, on the 26th April, 1886, and in the Probate Court 80
for Richland County, in the State of South Carolina, on the 19th May, 1886.

VII. That by said will the said Mrs. M. Delia Blount designated and appointed the plaintiff the remainderman, to take the whole of the estate limited under the 3rd clause of the will of the said Mrs. Sarah J. Harris; all of which will more fully appear by reference to the said will, copy of which, with the judgment of probate thereof, is hereto annexed and made a part of the complaint, and marked exhibit B. 81

VIII. That on the 31st day of December, 1886, the plaintiff demanded of the said Julius H. Walker, trustee, the said estate and an account of his actings and doings as such trustee and executor, but the said defendant, not regarding his duty in this behalf, refused to comply with plaintiff's request, and still refuses so to comply.

IX. That the defendant, Caroline M. Walker, is now the sole heir at law of the said Mrs. Sarah J. Harris.

Wherefore plaintiff demands judgment:

1. That he be adjudged to be owner of said estate. 82

2. That the said Julius H. Walker be required to pay over the same, and to account under the direction of this court for his actings and doings as executor and trustee under the will of the said Mrs. Sarah J. Harris, and for such other and further relief as may be just, together with the costs of this action.

ALLEN J. GREEN,
Plaintiff's Attorney.
GEO. W. BLOUNT,
Of Counsel.

(Verified.)

ANSWER OF JULIUS H. WALKER, EXECUTOR AND TRUSTEE.

(Title of cause.)

Answer of Julius H. Walker:

The defendant, Julius H. Walker, answering the complaint herein says:

I. He denies each and every allegation of the complaint not hereinafter admitted.

II. Further answering, he says, that on the 5th day of December, 1885, Sarah J. Harris, widow, died at her home, in the city of Columbia, in said State, where she had continuously resided for many years prior to her death, leaving of force a last will and testament, of which the first exhibit to the complaint is a true copy, as this defendant supposes; and at the date of said will, and at the date of said death, M. Delia Blount, the only child of testatrix, was resident and domiciled in said city of Columbia.

III. Shortly thereafter, this defendant proved the said will and qualified as executor therein named, and assumed the trusts therein conferred upon him, and possessed himself of the estate of his said testatrix, which is correctly stated in the complaint, and still holds said estate, except so much thereof as has been necessary to pay the debts of his testatrix and some of the expenses of his administration.

IV. Thereafter, in April, 1886, said M. Delia Blount died in Wilson, North Carolina, where she was then domiciled.

V. On May 19, 1886, a paper, purporting to be the exemplification of a will of said M. Delia Blount, from the Superior Court of Wilson County, North Carolina, where said will was alleged to have been proved by one of the subscribing witnesses thereto, was filed in the office of the probate judge for said Richland County; a true copy whereof, as this defendant supposes, is attached to the complaint as an exhibit.

VI. This defendant then consulted his legal advisers as to his duty, and was by them advised that inasmuch as it was very doubtful whether the property then in his hands, as executor and trustee, would pass to the plaintiff under the will of said Sarah J. Harris, by the appointment of said M. Delia Blount, unless

the will of said Mrs. Blount was duly executed according to the laws of South Carolina; and as the exemplication aforesaid did not show such execution, he could not safely turn over any of the said property in his hands to the said plaintiff, until satisfied that said will of M. Delia Blount was executed according to the laws of South Carolina, or until the judgment of the court was obtained, sustaining said will as a valid execution of the power conferred upon said M. Delia Blount by the will of her mother, the said Sarah J. Harris. 87

VII. To that end, and in order that the matter might be settled within the year after the death of said Sarah J. Harris, this defendant filed in the office of the probate judge for Richland County, on the day of July, 1886, a notice, requiring proof of the will of said M. Delia Blount, in due form of law; and if such proof should be made, and the said will should be established under the laws of this State, defendant was advised by his counsel that it would be his duty, at the end of the year, to surrender the net estate of his testatrix to this plaintiff; and defendant intended so to do. 88

VIII. To this notice plaintiff duly appeared, and commenced proceedings for the proof of the will of said M. Delia Blount in due form of law; but he thereafter abandoned said proceedings, and said will has not been yet proved in due form of law. 89

IX. Thereafter, in December, 1886, demand was made by plaintiff upon this defendant for the surrender and transfer of the property in his hands, belonging to the estate of said Sarah J. Harris, but this defendant refused to comply with said demand for the reason that he could not safely assume that plaintiff was entitled to said property until it should be determined that the will of M. Delia Blount had been executed according to the requirements of the law of this State, or was a valid execution of said power; and because his counsel so advised. 90

X. This defendant has been informed by Caroline S. Walker, sole heir at law of said Sarah J. Harris, that she would insist upon her right to the property in his hands belonging to the estate of said Sarah J. Harris, until it should be judicially determined that the will of said M. Delia Blount was a valid execution of the power vested in said Mrs. Blount by the will of said Sarah J. Harris.

91 XI. Under these circumstances, this defendant would himself have filed his complaint, asking for the instructions of the court as to his duty as between these conflicting claimants, but refrained from so doing because informed that the matter would be brought into court by this plaintiff.

XII. Since the commencement of this action, said Caroline S. Walker has also filed a notice with the Probate Judge of Richland County, requiring the proof of the will of said M. Delia Blount in due form of law.

92 XIII. This defendant is ready to transfer and surrender the estate in his hands, less his expenses and commissions, so soon as the court may determine to whom it belongs, and instructs this defendant as to his duties in the premises.

Wherefore defendant demands the judgment of this court:

1. Whether he can be called upon by plaintiff to account until the will of M. Delia Blount has been proved in due form of law.

2. Whether the will of M. Delia Blount is a valid execution of the power conferred upon her by the will of Sarah J. Harris,
93 and whether said will of Mrs. Blount has been duly executed so as to pass the property of said Sarah J. Harris in the hands of this defendant.

3. Whether this defendant shall transfer said property, real or personal, or both, to said plaintiff or to said Caroline S. Walker.

4. And that defendant may be allowed the costs and expenses of this action out of the trust property in his hands.

Columbia, S. C., February 10th, 1887.

POPE & SHAND,

94 *Defendant's Attorneys.*

(Verified.)

THE ANSWER OF CAROLINE S. WALKER.

(Title of case.)

Answer of Mrs. Walker:

The defendant, Caroline S. Walker (incorrectly named Caroline M. in the complaint), answering the complaint herein, says:

I. She admits the statements of the complaint as contained in the paragraphs thereof numbered I., II., and III. 95

II. Answering paragraph IV. of the complaint, this defendant admits that the said Mrs. Blount was domiciled at Wilson, in the State of North Carolina, at the time of her death, but avers that at the date of the death of Sarah J. Harris the said M. Delia Blount was domiciled at Columbia, in the State of South Carolina.

III. She admits paragraph V., except that she has been informed and believes that a portion of the estate of said Sarah J. Harris has been consumed in the payment of debts and expenses of administration. 96

IV. She admits the death of said M. Delia Blount, without issue, in the State of North Carolina, but denies that said Mrs. Blount left a will duly executed according to the laws of South Carolina. Of the other matters stated in paragraphs VI. and VII., she is not informed, and requires strict proof.

V. She believes the facts stated in paragraph VIII. to be true, and that her co-defendant has refused to account to plaintiff until the validity of M. Delia Blount's will has been duly established by the courts of this State. 97

VI. She admits paragraph IX. of the complaint, except that this defendant is named Caroline S. Walker, and not Caroline M., as therein stated.

VII. Further answering, this defendant alleges, on information and belief, that the will of M. Delia Blount was not duly executed according to the laws of South Carolina, and was, therefore, not an execution of the power given to said Mrs. Blount by the said will of Sarah J. Harris, or not a disposition of real and personal property situate in this State; and that the said will of M. Delia Blount did not operate upon the subject of the power contained in the will of the said Sarah J. Harris, but only upon the individual estate of the said M. Delia Blount. This defendant, therefore, claims and avers that she, as the sole heir at law of the said Sarah J. Harris, is entitled to the whole estate of said Mrs. Harris, and that her co-defendant, Julius H. Walker, executor and trustee, should not be required to surrender said estate, or any portion thereof, to the said plaintiff. 98

VIII. Since the commencement of this action, this defendant

has filed in the office of the probate judge for Richland County,
99 in this State, a notice requiring the proof, in due form of law, of the will of said M. Delia Blount.

Wherefore this defendant demands judgment, that she is entitled to the estate, both real and personal, of the said Sarah J. Harris, deceased. CAROLINE S. WALKER.

Columbia, S. C.,
February 10, 1887.
(Duly verified.)

100

CIRCUIT DECREE.

RICHLAND—*In Common Pleas.*

W. H. BLOUNT
v.
JULIUS H. WALKER, as Ex't'r and Trustee; CAROLINE S. WALKER.

This cause was tried before me, and the testimony adduced by
101 examination of witnesses in court.

The facts are: Mrs. S. J. Harris, of Columbia, died on the 5th day of December, 1885, leaving of force her last will duly executed according to the laws of S. C., which will was duly proved in the Probate Court for Richland County.

At the time of the execution of the will, and at the time of her death, Mrs. Harris had an only child, Mrs. M. Delia Blount.

That the said Mrs. Blount, at the time of the execution of her mother's will, and up to the time of her own death, was domi-
102 ciled in North Carolina, she being a married woman, and her husband residing in that State.

Mrs. Blount died at her residence in North Carolina on the 9th day of April, 1886, without issue, but leaving of force her last will and testament, by which she devised all the property of which, under the will of her mother, Mrs. Harris, she had the power of disposal, to her husband, the plaintiff. Mrs. Blount's will was duly proved in the Probate Court of North Carolina, in the county in which she resided, and a proper exemplification

under the laws of S. C. was admitted to probate in Richland 103
County on the 19th May, 1886.

The Court of Probate of North Carolina is, under the laws of N. C., a court of general jurisdiction in all matters testamentary. The exemplification of the judgment of that court, establishing this will, was properly proved according to the acts of Congress.

Mrs. Blount's will is not executed according to the laws of S. C. The question to be determined is whether Mrs. Blount's will is a valid execution of the power contained in Mrs. Harris's will. It is conceded in the argument, and is undoubtedly sound, that the appointee, under a power like the one under consideration, takes under the instrument creating the power, and not under the instrument of appointment. And in this case Mrs. Harris's will expressly conveys the property to the appointee under the power. 104

The only requisite required by Mrs. Harris's will for the execution of this power, is that the same shall be by "will duly executed"; and in this case that formality has been complied with, and is shown by the judgment of the court of her domicile. 105

It is therefore ordered, adjudged, and decreed, that the power is well executed, and the plaintiff is entitled to the property set out in the complaint and in the hands of the defendant, Julius H. Walker. It is further ordered, that the defendant, Julius H. Walker, do account before the master for his actings and doings in the premises, and that he pay over and surrender to the plaintiff or his attorney the said estate.

July 22, 1887.

W. H. WALLACE.

A true copy. 106

[SEAL.] E. R. ARTHUR,
C. C. C. P. & G. S.

OPINION AND JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA.

April 23, 1888. The opinion of the court was delivered by MR. JUSTICE MCIVER. There can be no doubt that the

ANSWER OF JULIUS H. WALKER, EXECUTOR AND TRUSTEE.

(Title of cause.)

Answer of Julius H. Walker:

The defendant, Julius H. Walker, answering the complaint herein says:

I. He denies each and every allegation of the complaint not hereinafter admitted.

II. Further answering, he says, that on the 5th day of De-
84 cember, 1885, Sarah J. Harris, widow, died at her home, in the city of Columbia, in said State, where she had continuously resided for many years prior to her death, leaving of force a last will and testament, of which the first exhibit to the complaint is a true copy, as this defendant supposes; and at the date of said will, and at the date of said death, M. Delia Blount, the only child of testatrix, was resident and domiciled in said city of Columbia.

III. Shortly therereafter, this defendant proved the said will
85 and qualified as executor therein named, and assumed the trusts therein conferred upon him, and possessed himself of the estate of his said testatrix, which is correctly stated in the complaint, and still holds said estate, except so much thereof as has been necessary to pay the debts of his testatrix and some of the expenses of his administration.

IV. Thereafter, in April, 1886, said M. Delia Blount died in Wilson, North Carolina, where she was then domiciled.

V. On May 19, 1886, a paper, purporting to be the exemplification of a will of said M. Delia Blount, from the Superior
86 Court of Wilson County, North Carolina, where said will was alleged to have been proved by one of the subscribing witnesses thereto, was filed in the office of the probate judge for said Richland County; a true copy whereof, as this defendant supposes, is attached to the complaint as an exhibit.

VI. This defendant then consulted his legal advisers as to his duty, and was by them advised that inasmuch as it was very doubtful whether the property then in his hands, as executor and trustee, would pass to the plaintiff under the will of said Sarah J. Harris, by the appointment of said M. Delia Blount, unless

the will of said Mrs. Blount was duly executed according to the laws of South Carolina; and as the exemplication aforesaid did not show such execution, he could not safely turn over any of the said property in his hands to the said plaintiff, until satisfied that said will of M. Delia Blount was executed according to the laws of South Carolina, or until the judgment of the court was obtained, sustaining said will as a valid execution of the power conferred upon said M. Delia Blount by the will of her mother, the said Sarah J. Harris. 87

VII. To that end, and in order that the matter might be settled within the year after the death of said Sarah J. Harris, this defendant filed in the office of the probate judge for Richland County, on the day of July, 1886, a notice, requiring proof of the will of said M. Delia Blount, in due form of law; and if such proof should be made, and the said will should be established under the laws of this State, defendant was advised by his counsel that it would be his duty, at the end of the year, to surrender the net estate of his testatrix to this plaintiff; and defendant intended so to do. 88

VIII. To this notice plaintiff duly appeared, and commenced proceedings for the proof of the will of said M. Delia Blount in due form of law; but he thereafter abandoned said proceedings, and said will has not been yet proved in due form of law. 89

IX. Thereafter, in December, 1886, demand was made by plaintiff upon this defendant for the surrender and transfer of the property in his hands, belonging to the estate of said Sarah J. Harris, but this defendant refused to comply with said demand for the reason that he could not safely assume that plaintiff was entitled to said property until it should be determined that the will of M. Delia Blount had been executed according to the requirements of the law of this State, or was a valid execution of said power; and because his counsel so advised. 90

X. This defendant has been informed by Caroline S. Walker, sole heir at law of said Sarah J. Harris, that she would insist upon her right to the property in his hands belonging to the estate of said Sarah J. Harris, until it should be judicially determined that the will of said M. Delia Blount was a valid execution of the power vested in said Mrs. Blount by the will of said Sarah J. Harris.

91 XI. Under these circumstances, this defendant would himself have filed his complaint, asking for the instructions of the court as to his duty as between these conflicting claimants, but refrained from so doing because informed that the matter would be brought into court by this plaintiff.

XII. Since the commencement of this action, said Caroline S. Walker has also filed a notice with the Probate Judge of Richland County, requiring the proof of the will of said M. Delia Blount in due form of law.

92 XIII. This defendant is ready to transfer and surrender the estate in his hands, less his expenses and commissions, so soon as the court may determine to whom it belongs, and instructs this defendant as to his duties in the premises.

Wherefore defendant demands the judgment of this court:

1. Whether he can be called upon by plaintiff to account until the will of M. Delia Blount has been proved in due form of law.

2. Whether the will of M. Delia Blount is a valid execution of the power conferred upon her by the will of Sarah J. Harris,
93 and whether said will of Mrs. Blount has been duly executed so as to pass the property of said Sarah J. Harris in the hands of this defendant.

3. Whether this defendant shall transfer said property, real or personal, or both, to said plaintiff or to said Caroline S. Walker.

4. And that defendant may be allowed the costs and expenses of this action out of the trust property in his hands.

Columbia, S. C., February 10th, 1887.

POPE & SHAND,

94 *Defendant's Attorneys.*

(Verified.)

THE ANSWER OF CAROLINE S. WALKER.

(Title of case.)

Answer of Mrs. Walker:

The defendant, Caroline S. Walker (incorrectly named Caroline M. in the complaint), answering the complaint herein, says:

I. She admits the statements of the complaint as contained in 95
the paragraphs thereof numbered I., II., and III.

II. Answering paragraph IV. of the complaint, this defendant admits that the said Mrs. Blount was domiciled at Wilson, in the State of North Carolina, at the time of her death, but avers that at the date of the death of Sarah J. Harris the said M. Delia Blount was domiciled at Columbia, in the State of South Carolina.

III. She admits paragraph V., except that she has been informed and believes that a portion of the estate of said Sarah J. 96
Harris has been consumed in the payment of debts and expenses of administration.

IV. She admits the death of said M. Delia Blount, without issue, in the State of North Carolina, but denies that said Mrs. Blount left a will duly executed according to the laws of South Carolina. Of the other matters stated in paragraphs VI. and VII., she is not informed, and requires strict proof.

V. She believes the facts stated in paragraph VIII. to be true, and that her co-defendant has refused to account to plaintiff until the validity of M. Delia Blount's will has been duly established 97
by the courts of this State.

VI. She admits paragraph IX. of the complaint, except that this defendant is named Caroline S. Walker, and not Caroline M., as therein stated.

VII. Further answering, this defendant alleges, on information and belief, that the will of M. Delia Blount was not duly executed according to the laws of South Carolina, and was, therefore, not an execution of the power given to said Mrs. Blount by the said will of Sarah J. Harris, or not a disposition of real and personal property situate in this State; and that the said will of 98
M. Delia Blount did not operate upon the subject of the power contained in the will of the said Sarah J. Harris, but only upon the individual estate of the said M. Delia Blount. This defendant, therefore, claims and avers that she, as the sole heir at law of the said Sarah J. Harris, is entitled to the whole estate of said Mrs. Harris, and that her co-defendant, Julius H. Walker, executor and trustee, should not be required to surrender said estate, or any portion thereof, to the said plaintiff.

VIII. Since the commencement of this action, this defendant

has filed in the office of the probate judge for Richland County,
99 in this State, a notice requiring the proof, in due form of law, of the will of said M. Delia Blount.

Wherefore this defendant demands judgment, that she is entitled to the estate, both real and personal, of the said Sarah J. Harris, deceased. CAROLINE S. WALKER.

Columbia, S. C.,
February 10, 1887.
(Duly verified.)

100

CIRCUIT DECREE.

RICHLAND—*In Common Pleas.*

W. H. BLOUNT
v.
JULIUS H. WALKER, as Ex't'r and Trustee; CAROLINE S. WALKER.

This cause was tried before me, and the testimony adduced by
101 examination of witnesses in court.

The facts are: Mrs. S. J. Harris, of Columbia, died on the 5th day of December, 1885, leaving of force her last will duly executed according to the laws of S. C., which will was duly proved in the Probate Court for Richland County.

At the time of the execution of the will, and at the time of her death, Mrs. Harris had an only child, Mrs. M. Delia Blount.

That the said Mrs. Blount, at the time of the execution of her mother's will, and up to the time of her own death, was domi-
102 ciled in North Carolina, she being a married woman, and her husband residing in that State.

Mrs. Blount died at her residence in North Carolina on the 9th day of April, 1886, without issue, but leaving of force her last will and testament, by which she devised all the property of which, under the will of her mother, Mrs. Harris, she had the power of disposal, to her husband, the plaintiff. Mrs. Blount's will was duly proved in the Probate Court of North Carolina, in the county in which she resided, and a proper exemplification

under the laws of S. C. was admitted to probate in Richland County on the 19th May, 1886. 103

The Court of Probate of North Carolina is, under the laws of N. C., a court of general jurisdiction in all matters testamentary. The exemplification of the judgment of that court, establishing this will, was properly proved according to the acts of Congress.

Mrs. Blount's will is not executed according to the laws of S. C. The question to be determined is whether Mrs. Blount's will is a valid execution of the power contained in Mrs. Harris's will. It is conceded in the argument, and is undoubtedly sound, that the appointee, under a power like the one under consideration, takes under the instrument creating the power, and not under the instrument of appointment. And in this case Mrs. Harris's will expressly conveys the property to the appointee under the power. 104

The only requisite required by Mrs. Harris's will for the execution of this power, is that the same shall be by "will duly executed"; and in this case that formality has been complied with, and is shown by the judgment of the court of her domicile. 105

It is therefore ordered, adjudged, and decreed, that the power is well executed, and the plaintiff is entitled to the property set out in the complaint and in the hands of the defendant, Julius H. Walker. It is further ordered, that the defendant, Julius H. Walker, do account before the master for his actings and doings in the premises, and that he pay over and surrender to the plaintiff or his attorney the said estate.

July 22, 1887.

W. H. WALLACE.

A true copy. 106

[SEAL.] E. R. ARTHUR,
C. C. C. P. & G. S.

OPINION AND JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA.

April 23, 1888. The opinion of the court was delivered by MR. JUSTICE MCIVER. There can be no doubt that the

donor of a power may prescribe the particular mode in which the power is to be exercised, and there is as little doubt that there can be no valid execution of the power unless the mode prescribed is strictly complied with. *Sudg. on Powers*, chap. 5, section 3.

So that the essential inquiry in all cases of this kind is: 1st. What is the mode prescribed by the donor of the power for its execution? and 2nd. Whether such mode has been strictly complied with?

Now, in this case, the mode prescribed by the donor of the power is expressed in these words—"by the last will and testament duly executed"—and the controlling question is, what was the intent of Mrs. Harris in using those words? Did she mean a will duly executed according to the laws of South Carolina, or did she mean a will duly executed according to the laws of any State or country in which the donee of the power might happen to be domiciled at the time of her death? Inasmuch as it is conceded that Mrs. Harris was, at the time of her death, and always had been, a resident of South Carolina; that her will was executed here according to the laws of this State, and that the property therein disposed of was all located here, it seems to us that her language in describing the mode prescribed for the execution of the power, must be interpreted to mean exactly what such language is usually understood to signify here, unless there is something in the context which would impart to it a different signification.

For the rule, as we understand it, is that in interpreting a will, a contract, or any other instrument in writing, the words must be taken in the sense which they usually bear in the place where such instrument in writing is executed. The purpose is to ascertain the intent of the parties, and where there is no ambiguity in the language used, such intent must be gathered solely from the words of the instrument, and those words must be interpreted in their usual and ordinary sense in the place where they are used. This rule is not only fully supported by authority, but by reason and common sense. A person, in a particular State or country, using words which, in that locality, bear a specific and well defined meaning, would naturally, and we may say necessarily, be regarded as using such words in that sense, unless

there was something in the paper itself which would indicate that 111
the words were used in a different sense.

Now, apply this doctrine to the case under consideration. Here was a South Carolina lady making her will in this State, whereby she was undertaking to dispose of property located here, and in doing so she confers a power which the donee can only exercise "by her last will and testament *duly* executed." It seems to us that, in the absence of anything in the will indicating a different purpose, these words must be interpreted to mean what they ordinarily and usually signify here; that is, a 112
will duly executed according to the laws of South Carolina, for that is what those words, when used here, usually and ordinarily, and we may say, universally signify here.

Now, is there anything in the will of Mrs. Harris which would indicate that she intended to use those words in a different sense? We must confess that we are unable to find anything of the kind. On the contrary, when we look to other parts of the will and find that the testatrix has taken unusual and extraordinary precautions to guard Mrs. Blount, the donee of the power, from any imposition or undue influence in exercising the power conferred 113
by the will, to call upon the trustee "to sell, exchange, or transfer" any of the property given to Mrs. Blount for life, it would be difficult to believe that Mrs. Harris intended that she should be deprived of that protection which the laws of South Carolina throw around a testator, by requiring that his last will and testament shall be executed with the solemnities required by our statute. Mrs. Harris manifestly regarded her daughter as a person liable to, and in danger of, being improperly influenced by some one, in the disposition of her property, and it can hardly be supposed that she intended that her daughter should exercise 114
the power of absolutely disposing of this property by will without the observance of those forms which she must be assumed to have known the wisdom of her State had prescribed for the protection of testators from undue influence.

It is said, however, that if Mrs. Harris had intended that Mrs. Blount should exercise the power of appointment only by a will executed in the manner prescribed by our statute, it would have been very easy for her to say so by the addition of a very few words to those prescribing the mode of appointment—that she

might have said, "by her last will and testament duly executed," *according to the laws of South Carolina.* But according to our view, that is precisely what the words used mean, and the additional words suggested would have been mere surplusage. If, however, Mrs. Harris really intended that the power conferred could be exercised by the donee by her last will and testament, executed anywhere, and according to the laws of any place where Mrs. Blount might happen to be domiciled, then additional words would have been necessary to express such an intention, and the testatrix should have said, "by her last will and testament duly executed" *according to the laws of the place where Mrs. Blount might reside or be domiciled.*

Suppose the mode prescribed for the execution of the power had been "by deed duly executed," can there be a doubt that those words would be interpreted to mean an instrument in writing, signed, sealed, and delivered in the presence of two subscribing witnesses? And why? Simply because that is the meaning of the word "deed" here. For the same reason the words used in the will under consideration must be interpreted, a will duly executed according to the laws of South Carolina.

The fact that the paper alleged to be the will of Mrs. Blount has been admitted to probate in North Carolina, and an exemplification thereof in this State, does not affect the question. This paper was doubtless a valid will in North Carolina, sufficient to pass any property which Mrs. Blount was entitled to in her own right in that State, and any personal property which she owned anywhere, and was, therefore, no doubt, properly admitted to probate there, as well as here, upon the exemplification under the statute. But the question here is, not whether Mrs. Blount has made a will disposing of her own property, but whether the paper propounded as such is a valid execution of the power conferred by the will of Mrs. Harris; and for the reasons above stated we do not think it is.

Under the view taken by the Circuit Judge it was unnecessary for him to consider or determine the other question, discussed here, as to who would be entitled as heirs at law of Mrs. Harris to the property in the event of the failure to exercise the power conferred by her will, and accordingly he made no decision upon that subject. That question is, therefore, not properly before us

at this stage of the case. The powers of this court being appel- 119
late only, so far as cases like this are concerned, we have no authority to decide, originally, any question, but are confined to a review of the judgment of the Circuit Court, and as that court has rendered no judgment upon this question, there is nothing before us for review, so far as such question is concerned. The case must, therefore, be remanded to that court for the consideration and determination of the question, which now properly arises as to who will be entitled to the property involved in this controversy as heirs at law of Mrs. Harris—whether those who stood in that relation to her at the time of her death, or those who 120
occupied that position at the time of the death of the life tenant, Mrs. Blount, together with any other questions incidental thereto.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

MR. JUSTICE MCGOWAN concurred; MR. CHIEF JUSTICE SIMPSON dissented. 121

PETITION FOR WRIT OF ERROR.

UNITED STATES OF AMERICA.

To Hon. W. D. Simpson, Chief Justice of the Supreme Court of South Carolina:

The petition of Wm. H. Blount shows to your honor:

1. That he is a citizen and resident of the State of North Car- 122
olina.

2. That in the Supreme Court of the State of South Carolina, the court of highest resort in said State, in an action brought by your petitioner, as plaintiff, against Julius H. Walker, as trustee and executor of the will of Sarah J. Harris, deceased, and Caroline S. Walker, defendants, for the purpose of recovering from said defendants certain property in the complaint specifically set forth, a certain decree rendered in the Circuit Court for Richland County, on the 22nd day of July, 1887, adjudging your petitioner *to be the appointee* under the power contained in the will

123 of the said Sarah J. Harris, and entitled to the property described in the complaint, was, by the judgment of the said Supreme Court of the State of South Carolina, rendered and filed on the 23rd day of April, 1888, reversed, and the cause remanded for further proceedings.

3. That under the proceedings by the said decree of the said Supreme Court directed your petitioner was again adjudged to be the owner of all the personal property set forth in the complaint, and of one-half of the realty, by a decree of the said Circuit Court of Richland County, in the State of South Carolina,
124 rendered and filed in said court on the 13th day of July, 1888.

4. That on the 15th day of April, 1889, the said Supreme Court of the State of South Carolina rendered a final judgment in said cause, reversing the judgment of the said Circuit Court, and adjudging that your petitioner had no right, title, or claim to said property whatsoever, and that the same belongs to the defendant, Caroline S. Walker, and directing the said Circuit Court to enter decree to carry said judgment into effect; all of which will more fully appear in the records and proceedings of said
125 Supreme Court, and that in the rendition of the judgment of the said Supreme Court of the State of South Carolina, of date April 23rd, 1888, manifest error hath happened to the great damage of the plaintiff in this, to wit:

Because said judgment of reversal was rendered and entered without giving to a certain judgment of the Court of Probate of the County of Wilson, in the State of North Carolina—a superior court of record of competent jurisdiction—there duly rendered and duly proved in the said cause, the same force and effect under section 1, of article 4, of the Constitution of the
126 United States, and the acts of Congress carrying the same into effect, to which it is entitled in the courts of said State of North Carolina, in that said judgment of reversal did not take into consideration, that said judgment of the said Court of Probate is conclusive of the rights and title of plaintiff to said property and estate. And the said Supreme Court erred in reversing the judgment of the said Circuit Court for Richland County, all of which matters appear in the record thereof.

Wherefore your petitioner prays that a writ of error may be allowed to remove into the Supreme Court of the United States

the record of the judgment aforesaid, to the end that the errors 127
therein appearing may be corrected, as of right and according to law and custom of the United States, and that justice in the premises may be done.

And as in duty bound your petitioner will ever pray.

W. H. BLOUNT.

WRIT OF ERROR

128

THE UNITED STATES OF AMERICA.

The President of the United States of America to the honorable Chief Justice and Associate Justices of the Supreme Court of the State of South Carolina, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court, before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in said suit between William H. Blount, as plaintiff, and Julius H. 129
Walker, as executor and trustee, and Caroline S. Walker, defendants, wherein was drawn in question a right, title, or privilege claimed under the Constitution of the United States and the acts of Congress passed in pursuance thereof, and the decision was against the right, title, or privilege so set up and claimed by the plaintiff thereunder a manifest error hath happened to the great damage of the said William H. Blount as by his complaint appears.

We being willing that the error, if any hath been, should be 130
duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly, and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct

131 that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. W. Fuller, Chief Justice of said Supreme Court, this third day of June, A. D. one thousand eight hundred and eighty-nine.

[Seal of Clerk Court.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Allowed by under case of Crapo and Kelley.

W. D. SIMPSON,
Chief Justice of Supreme Court of South Carolina.

In the Supreme Court of the United States, 132

OCTOBER TERM, 1889.

NO. 1399.

WILLIAM H. BLOUNT, *Plaintiff in Error*, 133

v.

JULIUS H. WALKER, EXECUTOR AND TRUSTEE, AND CAROLINE S. WALKER, *Defendants in Error.*

To Messrs. Allen J. Green, George W. Blount, and Samuel F. Phillips, attorneys for plaintiff in error:

Please take notice that at the opening of the Supreme Court of the United States in the city of Washington, on Monday, the 134
24th day of March next, a motion will be submitted in behalf of the defendants in error in the above stated cause, to dismiss the writ of error herein upon the ground that no federal question is involved, and said Supreme Court is therefore without jurisdiction in the matter.

The argument hereunto attached, with the statement of facts therein contained, will be submitted in support of said motion, and as a part thereof.

Respectfully,

JOS. DAN'L POPE, 135
ROBT. W. SHAND,
Attorneys for Defendant in Error

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131 that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. W. Fuller, Chief Justice of said Supreme Court, this third day of June, A. D. one thousand eight hundred and eighty-nine.

[Seal of Clerk Court.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

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W. D. SIMPSON,
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In the Supreme Court of the United States, 132

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Respectfully,

JOS. DAN'L POPE, 135
ROBT. W. SHAND,
Attorneys for Defendant in Error.

February 15, 1890.

Service accepted and three copies received of this notice and the argument annexed thereto for the attorneys of plaintiff in error this 21st day of February, 1890.

(signed) Allen J. Green
Pltff's Atty.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1399.

WM. H. BLOUNT, PLAINTIFF IN ERROR,

vs.

JULIUS H. WALKER, EXECUTOR, &c., DEFENDANTS IN ERROR.

ARGUMENT AGAINST THE MOTION TO DISMISS.

S. F. PHILLIPS,
For W. H. Blount.

ALLEN & GREEN,
BLOUNT & MURRAY,
Of Counsel.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1399.

WM. H. BLOUNT, PLAINTIFF IN ERROR,

vs.

JULIUS H. WALKER, EXECUTOR, &c., DEFENDANTS IN ERROR.

ARGUMENT AGAINST THE MOTION TO DISMISS.

The record, with the exception of the dissenting opinion of the chief justice below, appears in the brief of the defendants in error. The dissenting opinion is attached to this argument, and we ask that it be read in connection therewith.

The facts may be briefly stated as follows: Mrs. S. J. Harris, a widow domiciled in South Carolina, and seized and possessed of real and personal property, died, having, by will properly proved and sufficient to pass every species

of property, devised the residue of the above property to such person or persons as her daughter, Mrs. M. D. Blount, should, by her last will and testament duly executed, appoint. At the time of the making of Mrs. Harris' will and at the time of her death, Mrs. Blount was domiciled in North Carolina. Mrs. Blount afterwards died at that domicile, leaving a will by which (Defendants' Brief, folios 56, &c.) she designated the plaintiff in error as appointee, &c.

By the probate court of Wilson county, N. C., a superior court of record and of competent jurisdiction, the will of Mrs. Blount was adjudged to be her last will and testament duly executed. Afterwards the plaintiff in error brought this action in a State court of South Carolina to recover this property and compel the executor to account, claiming title through the will of Mrs. Blount and the judgment of the court of North Carolina. (See paragraphs 6 and 7 of the complaint, folios 79–81, Defendants' Brief.) Upon circuit the plaintiff recovered, the circuit judge basing his judgment upon the Federal question, saying: "The only requisite required by Mrs. Harris' will for the execution of the power is that the same shall be by 'will duly executed,' and in this case that formality has been complied with and is shown by the judgment of the court of her domicile." (See Defendants' Brief, fol. 104.)

Upon appeal to the supreme court of South Carolina that judgment was reversed.

For error therein, the plaintiff has assigned (see Defendant's Brief, folio 125, &c.) that the said judgment was rendered without giving to the judgment of the probate court of North Carolina the same force and effect under section 1 of article 4 of the Constitution of the United States, and acts of Congress carrying the same into effect, as it is entitled to in North Carolina.

Section 1 of article 4 of the Constitution provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." Congress by the acts of 1790 and 1804 has prescribed such manner and effect. By the act of 1790, after providing the manner of authenticating the proceedings, &c., it is enacted, "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." (Rev. Stat., § 906.)

Under this statute it was held by this Court that the "faith and credit spoken of are not limited to the form of the record and are not satisfied by its admissions as a record, but that the same effect must be given to the record in the courts of the State where produced as in the courts of the State from which it is taken."

Mills *vs.* Duryee, 7 Cranch, 488.
Leland *vs.* Wilkinson, 6 Pet., 317.
Crapo *vs.* Kelly, 16 Wall., 610.

Under the system of pleading in use in South Carolina conclusions of law cannot be alleged. In fact, this would be bad pleading under the Code.

Hogg *vs.* Pinckney, 16 S. C., page 393.
Citing Pom. Rem., sec. 517, *et seq.*

The Code of South Carolina requires a plain and concise statement of the facts constituting the cause of action without unnecessary repetition.

Secs. 162 and 163 (1882).

So while under the system of pleading in use on the equity side of the United States courts it might be proper to allege the force and effect of this judgment, under the South Carolina Code such an allegation would be unnecessary and bad pleading. The pleader must allege only the necessary facts.

If this action had been brought in North Carolina the judgment of the probate court would have been conclusive of plaintiff's title.

The rules governing the jurisdiction of this court in writs of error to State courts are, briefly:

The jurisdiction will attach "whenever it appears from the record that a Federal question has been raised and decided by the State court against the right claimed by the plaintiff in error;

"Or that the decision of the Federal question was necessary to the rendition of the judgment or decree."

Murdoch *vs.* Memphis, 20 Wall., 590; 87 U. S., 429.

It is not necessary that the question should appear on the record to have been raised and the decision made in *ipsissimis verbis*, but it is sufficient if it appear by clear and necessary intendment that the question must have been raised and must have been decided in order to render the judgment.

Crowell *vs.* Randall, 10 Pet., 368.

It is sufficient if it appear from the record that the federal question was necessarily involved in the decision, and the State court could not have given the decree without deciding it.

16 Pet., 281.

The true test of jurisdiction over State courts is not whether the record exhibits an express statement that a fed-

eral question was presented, but whether such a question was decided and decided adversely to the Federal right. The form and mode in which it was decided are of minor importance.

Murray *vs.* Charleston, 96 U. S., 24.

The position of the other side is:

1. No federal question was raised.
2. No federal question is involved.
3. The State court has based its judgment on another ground, and has given the foreign record all the weight it is entitled to.

As already said the case made by the record is that Mrs. Harris, domiciled in South Carolina, by her will invested Mrs. Blount, domiciled in North Carolina, with power to "appoint by her last will and testament, duly executed," an absolute estate, in a certain residue of things real and personal; that Mrs. Blount made such appointment by will, duly executed at her place of domicile, as shown by a decree of the probate court there; and that the supreme court of South Carolina has denied that such will is duly executed, within the words above quoted.

In passing upon powers over personalty created by will courts of equity require that the fact of the execution of an alleged will shall have been previously established by decree of the proper probate court. (2d Sudg. Pow., 18; ed. 1856.) A statute in North Caroline (1844, Code of 1882, sec. 2139) accordingly provides that "No appointment made by will in exercise of any power shall be valid unless the same be executed in the manner by law required for the execution of wills." Therefore a probate judgment that a particular will has been "duly executed" is eviscerated and practically annulled if afterwards such court of equity shall

hold to the contrary. Consequently, if such probate judgment be a record in another State than that of the court of equity, a Federal question is raised by the action of the latter court; just as in the case of Crapo *vs.* Kelly, 16 Wall., 110, where it was held that the judgment of a New York court to the effect that an assignment made by a Massachusetts insolvent court of a ship then on the high seas could not prevail against a subsequent seizure thereof by a New York sheriff, gave rise to a Federal question. A contest arises at once betwixt the effect of the North Carolina probate judgment and that of the South Carolina equity decree. We speak of course only of a case where, as here, the decree in equity declares that no appointment has been made for the reason that the will in question *has not been duly executed.*

However, to take up the above points in their order:

The first and second propositions are answered by the complaint and the judgment of the circuit court already referred to.

The opinion of the majority of the supreme court below alludes to the question and apparently evades but in reality *decides* it when they say: "The fact that the paper *alleged to be the will* of Mrs. Blount has been admitted to probate in North Carolina and an exemplification thereof in this State does not affect the question." (See Brief for defendants, folio 117.) Mark the words italicized—*alleged to be the will.* If the judgment of the court of North Carolina is not sufficient to establish that it is the will of Mrs. Blount, then clearly the record has been introduced in vain. The chief justice, in his dissenting opinion, goes squarely to the Federal question and says:

"The paper relied upon by the respondent has been declared by a probate court in North Carolina, where she had lived, and where she had died, to be the last will and testament of Mrs. Blount; also in this State. It cannot be denied, then, that it was duly executed, including freedom

from undue influence and fraud, and with the presence of all necessary legal forms, because the probate in the court of North Carolina having jurisdiction in such matters necessarily embraces all this."

See Appendix.

From this it clearly appears that plaintiffs were insisting, as they did from the inception to the end, that under the judgment of the North Carolina court, this Court must grant plaintiff the relief asked.

This will be clearer when it is remembered that it is conceded by all parties and all the judges that the law of the *situs* had been complied with by Mrs. Harris's will, and the property vested in the person who should be designated as remainderman "by the last will and testament" of Mrs. Blount, "duly executed." The only issue in the case was, Was the will propounded the last will and testament of Mrs. Blount?

So it was not only raised, but we insist was the only live question involved, and the judgment of the court could not have been rendered without deciding it.

As to the third proposition, the opinion of this Court in Crapo *vs.* Kelly (above) places the matter so pithily that we ask leave to apply it *mutatis mutandis*: "Without reference to whether Blount was right or wrong, whether the question was *res integra* or *res adjudicata*, the fact that he claimed title under a *North Carolina* record, and that his claim was overruled, gives this court jurisdiction of the present case."

This Court will not allow its jurisdiction to be ousted and evaded by the State court's placing its decision upon the ground of a construction that avoids the Federal question.

This principle upon which we rely is well stated in the case of Bridge Proprietors *vs.* Hoboken (1 Wallace, 144), followed by Delmas *vs.* Insurance Co. (14 Wallace, 668) and Jefferson Bank *vs.* Skelly (1 Black, 426).

"It is no objection to the jurisdiction that the question decided by the State court was on the construction and not on the validity of the contract. If the construction is one which violates the contract it is clear plaintiffs have no relief except in this court, and unless it takes jurisdiction it cannot see that the obligations of the contract have not been violated."

In brief, our position is—

That the decision of the State court necessarily involved the question whether the will of Mrs. Blount was her "last will and testament duly executed."

That the judgment of the probate court of North Carolina is conclusive of this and whether in the decision the State court has given this judgment the same force and effect as it has in North Carolina is the Federal question.

And it is immaterial whether the State court has decided the judgment void or evade a deliverance on the ground of construction.

The jurisdiction having attached, each party is entitled to be heard on the merits. As said by this Court in Baltimore and Ohio R. R. *vs.* Maryland (20 Wallace, 643):

"When a Federal question has been raised and has been decided against plaintiff in error in a State court, jurisdiction of this Court attaches and the case must be heard upon the merits, although the State court placed its decision on another ground that does not present a Federal question. Both parties are entitled to be heard in this court on the soundness of the decision of the Federal question, on its sufficiency to control the judgment in the whole case and on the sufficiency of any other point decided to affirm the judgment, even if the Federal question was erroneously decided."

S. F. Phillips,
For W. H. Blount.

Allen & Green,
Blount & Murray,
Of Counsel.

APPENDIX.

Mr. Chief Justice Simpson dissenting (omitting the statement), the appeal therefore involves, in the first instance, the single question whether his honor erred in decreeing in favor of the respondent.

The following legal propositions will be conceded, no doubt: First. That the disposition by will of real property located in a State (South Carolina) must be made (under the doctrine of *rei sitae*) according to the laws of said State (South Carolina), and of personal property according to the laws of the domicile of the owner. (Story Confl. Laws, 474; 1 Redf. Wills, 398.) Second. That where a testator devises and bequeaths property to one for life, with power on the part of the life tenant to appoint one to the remainder, if the power is properly executed the appointee will take by virtue of the will of the original testator and not by the execution of the power. In other words, the executed power becomes a part of the will of the original testator as much so as if it had been originally incorporated therein.

Pulliam *vs.* Byrd, 2 Strob. Eq., 137.
Robinson *vs.* Hardcastle, 2 T. R., 252.
3 Am. and Eng. Encyclo. Law, 633.
Tatnall *vs.* Hankey, 2 Moore P. C., 342.
Thompson *vs.* Perry, 2 Hill, ch. 214; 29 A. D., 68.

It follows from these propositions that if Mrs. Blount legally executed the power given her by Mrs. Harris, Mr. Blount, her husband, became a beneficiary of Mrs. Harris precisely as if Mrs. Harris had named him in her will as devisee and legatee of the property in question, in which event both the law of the *situs* and of the domicile would be

complied with, as there is no doubt that the will of Mrs. Harris was executed according to the laws of this State and that the real estate and the personalty were both hers, and both within the State.

The turning point of the case, then, is, Did Mrs. Blount legally execute the power of appointment given her? If so, then the respondent takes under the will of Mrs. Harris, which, as we have said, meets the demands of both the *situs* and of the domicile—*lex rei sitae*, *lex domicilii*. Now, Mrs. Blount was invested with power, not to dispose, but to appoint "by her last will and testament *duly executed*." Did she *duly* execute a last will and testament in which the respondent was the appointee? There is no doubt but that she executed a paper in North Carolina, where she then lived and where she died, which has been admitted to probate in that State, and established there as her last will and testament, and in which her husband, the respondent, was appointed beneficiary of the property in question. This will, it is true, had not been attested by three witnesses in the presence of each other, one of the three having failed to attest in the presence of the other two, and was not, therefore, in compliance with the laws of this State, which require three witnesses to sign in the presence of each other, and because of this fact it is urged that the power was not executed in accordance with the will of Mrs. Harris.

Did Mrs. Harris require the power to be executed by a will made according to the laws of this State? If so, then his honor was in error, as his holding would be contrary to the intention of Mrs. Harris, which must govern. The intention of the author of any paper, whether it be a will or any other instrument, must be reached by the language used; and the first and most important rule in endeavoring to reach the intent through the language is to give to the words employed their usual and ordinary signification. The words demanding construction here are *duly executed* or

rather the word *duly*, as there is no ambiguity about the word *executed*.

What did Mrs. Harris mean by that qualifying word *duly?* The property was hers, and she had the right to dispose of it as she saw proper, she had the right to give the whole of it to her daughter, or she had the right to dispose of it, as she did, to an appointee, to be selected by her daughter, and she had the right to require the appointment to be made in any manner she chose; and the courts should hold that the manner of the appointment directed should be complied with; otherwise the intent will be defeated and the will would become the will of the court and not that of the testatrix. Now, what is the usual and ordinary meaning of the word *duly?* According to lexicographers it means "in a fit and becoming manner, regularly, properly." Such are its ordinary meanings. They do not in terms include any special legal form; but inasmuch as a last will and testament can nowhere be executed, except with some recognized legal form, this word, when qualifying the execution of such a paper, must necessarily include the idea of legal requirements.

Looking at the language, then, of Mrs. Harris, as used in her will in reference to the power given to her daughter, we conclude, first, that she intended her daughter to execute this power by a last will and testament, executed regularly and properly—that is, free from undue influence, fraud, and imposition, in accordance with law and in proper legal form. Did Mrs. Blount execute such a paper and as thus required? The paper relied upon by the respondent has been declared by a probate court in North Carolina, where she had lived and where she died, to be the last will and testament of Mrs. Blout. Also in this State. It cannot be denied, then, that it was duly executed, including freedom from undue influence and fraud, and with the presence of all necessary legal forms, because the probate in the court of North Carolina having jurisdiction of such matters, of necessity embraces

all this. Reaching this result, we conclude, second, that in so far as our judgment is to rest upon the words of Mrs. Harris' will and her intent, developed through them by the application of the usual rules of construction, that Mrs. Blount properly exercised the power with which she was invested by her last will and testament now before the court.

But it is earnestly urged that Mrs. Harris did not intend this; on the contrary, that she intended that the power given her daughter should be exercised by a last will and testament executed according to the laws of South Carolina, and in no other way. Such a conclusion not appearing in the words of the will, can it be reached by a consideration of the circumstances by which she was surrounded at the time of her will? Where an intent is doubtful it is sometimes proper to resort to surrounding facts and circumstances in aid of the legal and ordinary rules of construction. Assuming the intent here to be doubtful, let the aid suggested be invoked; what were the surrounding circumstances? Mrs. Harris during her life was a citizen of South Carolina. She had just executed her own will in accordance with the laws of her State. She must be supposed to have known that the legal form of such papers here required three witnesses attesting in the presence of each other.

These facts, it is true, are somewhat significant; but, on the other hand, she knew that her daughter was a married woman; that her husband's residence was in North Carolina; that her daughter had no close relations here, and that after her own death she would be left alone; that under these circumstances she would, in all probability, go to the home of her husband, which, being the domicile of her husband, was her domicile (Warrender *vs.* Warrender, 2 Cl. & F., 488), there to reside permanently, and there, when she came to die, to make and leave her will. These facts are equally as significant as those above, and when it is remembered that no doubt it was the substance of Mr. Harris's wish and will that her daughter should direct the disposi-

tion of the property given to her for life when she was done with it, wherever she might be, and when it is further remembered that she did not state in terms that the will of her daughter should be made under the laws of this State, but only that it should be by will duly executed, the circumstances last mentioned above seem to strongly support the conclusion reached by the analysis made of the language of her will, to wit, that her daughter's desire upon this subject expressed in a will duly executed and established as her will, in any State where she might reside, should control.

But are there any authorities or controlling decisions upon this subject? If so, where they lead we must follow. We have found none in our own State nor have the able counsel engaged in the case referred to any in our reports where this precise question was raised. The English cases are not entirely clear on the point, but so far as we have examined we think their weight is in support of the conclusion we have reached above. In Brack *vs.* Johnston (5 Wils. & Sh., 61) a Jamaica will executed under a power reserved to be exercised by "my will or by any separate writing or letter to that effect" passed property in Scotland. It is true the power reserved included any separate writing or letter, but it also included a will, and a will was executed under the laws of Jamaica and it was held sufficient.

In D'Huart *vs.* Harkness (34 Beav., 324) personal property was given by an English will to trustees resident in England, with a power in the Baroness D'Huart to appoint, by her last will and testament in writing duly executed. The baroness, domiciled in France, made her will in France, which was valid by the law there, but not by the English law. Lord Romilly held "that a power to appoint by will simply may be executed by any will which, according to the law of this country, is valid, though it does not follow the forms of the statute." It is urged, however, that this decision was made after the passage of Lord Kingsdown's act, which provided that as to personal property a will by a

British subject, if valid where made, should be valid in England, and, although Lord Kingsdown's act had not gone into effect in England, yet that it influenced the opinion of the court. Lord Romilly does not allude to this act.

In Pennsylvania the noted case known as Bingham's Appeal (64 Pa. St., 346) seems to point in the other direction, though the precise question is not discussed. In that case William Bingham, a citizen of Pennsylvania, bequeathed certain personal property to trustees in Pennsylvania with power to Alexander Bingham to appoint by his last will and testament. Alexander died, domiciled in England, possessed of an estate of his own, which he bequeathed to certain parties, not mentioning the estate over which he had power to appoint. Under the English law such a will would pass both his own estate and the estate covered by the power, but in Pennsylvania it would not. The question before the Pennsylvania court was which law should govern. The court held that the law in Pennsylvania controlled. That case, however, did not involve the question raised here. Here the question is one of intention on the part of Mrs. Harris as to the *form* in which the power should be executed. She had the right to give her daughter a power to make an appointment by her will duly executed in any State, and the question is, did she grant such a power?

In the Bingham appeal the question was one of law, as to the proper *construction* of the alleged executed power, to wit, whether the will as executed by Alexander Bingham, not mentioning the estate over which he had power, carried said estate. Did the will as executed without reference to the power furnish such intent? It did not in Pennsylvania, but it did in England, and the point was, which should control? The question there was the intent of the donee of the power, not that of the donor. Here it is the intent of the donor. That of the donee is plain and evident. There, it being the law in Pennsylvania that no power of the kind could be executed except by reference to the power, this

determined the intent of the donee; but here there is no law holding that such power cannot be executed except by a will executed under the laws of this State. The donor may permit any *form*, to wit, a will executed elsewhere, and the question is, has she done so?

In Massachusetts, in the case of Sewall *vs.* Wilmer (132 Mass., 131), Chief Justice Gray said: "As to the form of executing the power, it would seem that a will executed in the form authorized by the law of either State would be sufficient." And he cites Willock *vs.* Ouchterlong, 3 Paton, 659; Brack *vs.* Johnston, 5 Wills & Sh., 61, *supra*, and D'Huart *vs.* Harkness, 34 Beav., 324, *supra*.

It is said that these cases all involved personal property alone. That is perhaps true, but the character of the property is not before us; it is the principle applicable to cases like this before the court that we are after. In these cases the *lex domicilii* could not have controlled the question, because the personal property involved did not belong to the party executing the powers, and therefore the law of his domicile could have had no application.

It is urged that real estate cannot pass unless the forms of law permitting it to pass have been strictly complied with, and that as to wills the statute requires at least three witnesses. This would be conclusive if respondent's claim depended upon the will of his wife passing to him title to the real estate in contest, but this is not the fact. He claims under the will of Mrs. Harris, which, it is admitted, was executed with all due legal formality, three witnesses, and all other requisites.

So that it appears to us, at last, that although no direct and positive decision on the precise question before us has been found, yet that distinguished and learned judges and courts, both of this country and England, have indicated an opinion in accordance with our conclusion above. And in the absence of all controlling adverse authority, we feel constrained to affirm the judgment below of his honor, Judge Wallace.